



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 22, 2005

Mr. J. Kevin Patteson  
Assistant General Counsel  
Office of the Governor  
P. O. Box 12428  
Austin, Texas 78711

OR2004-10792A

Dear Mr. Patteson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215317A.

The Office of the Governor (the "governor") received a request for the following information concerning the Texas Enterprise Fund agreement made with Vought Aircraft Industries, Inc. ("Vought"):

Application for Texas Enterprise Fund submitted by [Vought]. Any and all documents and records, including but not limited to, expense reports, donor records, reimbursements, invoices, checks, memoranda, annual reports, bank receipts, ledgers, bank statements and e-mails related to the Vought grant application and/or award.

This office issued Open Records Letter No. 2004-10792 (2004) on December 21, 2004, in response to the governor's request for a decision. It was subsequently brought to our attention by counsel for the requestor, Mr. Dave Michaels of the Dallas Morning News, that we were not apprised of pertinent information concerning the Economic Development Agreement the governor entered into with Vought on February 26, 2004, necessary to the proper evaluation of the governor's claimed exceptions to disclosure. We have re-examined our ruling in light of our communications with the requestor and the governor and determined that Open Records Letter No. 2004-10792 is in error and should be withdrawn. The present decision shall substitute for the ruling issued as Open Records Letter No. 2004-10792.

You state that some responsive information has been released. You claim, however, that the remaining information is excepted from disclosure under sections 552.104, 552.107,

552.110, 552.111, 552.131, and 552.137 of the Government Code. Furthermore, pursuant to section 552.305 of the Government Code, the governor notified Vought of the request and of the company's right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have received correspondence from counsel for Vought. We have considered all of the submitted arguments and reviewed the submitted information.

We begin by addressing the e-mail addresses you state you have redacted from the documents you have provided to the requestor. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is specifically excluded by section 552.137(c). *See* Gov't Code § 552.137(a)-(c). Section 552.137(c) expressly provides that an e-mail address "provided to a governmental body in the course of negotiating the terms of a contract or potential contract" is not excepted from disclosure. *Id.* The e-mail addresses at issue here were provided to the governor in the course of negotiating the terms of a contract or potential contract. We therefore find that the e-mail addresses you have marked in the documents submitted Exhibit F are not excepted from disclosure under section 552.137(a) and may not be withheld on that basis.

We next address your claim under section 552.104 of the Government Code with respect to the information submitted as Exhibits A through C. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The section 552.104 exception serves two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. Open Records Decision No. 593 at 2. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* Open Records Decision No. 541 (1990).

In this case, we find you have not established that the governor has specific marketplace interests with respect to the award of incentive grants from the Texas Enterprise Fund. We therefore find the records at issue are not excepted under section 552.104 on that basis. Furthermore, while you indicate that other state officials and local government agencies are

still negotiating certain business incentive agreements with Vought in connection with Vought's prospective plans to consolidate operations in Texas, we note that at the time the governor received the present request, the governor and Vought had executed an agreement under which Vought received funds from the Texas Enterprise Fund. Thus, to the extent section 552.104 would have been applicable to records of the governor concerning the Texas Enterprise Fund agreement, we find that the competitive situation pertinent to the records at issue was concluded at the time of the request and we determine that the governor may not withhold the records under section 552.104 of the Government Code.

You also raise section 552.131 of the Government Code, which provides in pertinent part, "[u]nless and until an agreement is made with [a] business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure]." Gov't Code § 552.131(b). We note that the applicability of section 552.131 ends once the governmental body completes an agreement with the business prospect. Gov't Code § 552.131(c). As noted, at the time the governor received the present request the governor had completed a Texas Enterprise Fund agreement with Vought. While you contend that the State of Texas, through the governor, is currently negotiating with Vought regarding "other aspects" of Vought's prospective consolidation plans "and the incentives involved," we understand that the other negotiations involve incentives to be offered by other state officials or local agencies, rather than the governor. You have not explained how the governor is authorized to enter into an economic incentive agreement with Vought on behalf of any such other entities. We therefore determine the governor may not withhold the information in Exhibits A through C pursuant to section 552.131(b) of the Government Code.

Vought has submitted comments to this office arguing that certain information in Exhibits A through C is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. Section 552.110(b) of the Government Code protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999). Upon review, we determine that Vought has shown that most of the records in Exhibits A, B, and C consist of commercial or financial information, the disclosure of which would cause substantial competitive harm to Vought. Accordingly, we have marked the information that is excepted from disclosure under section 552.110(b) and must be withheld.<sup>1</sup> However, the remainder of Exhibits A through C consists solely of information pertaining to the Texas Enterprise

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<sup>1</sup> Based on this finding, we need not reach Vought's claim under section 552.101 of the Government Code.

Fund agreement which has already been made public by the governor, or general information about Vought which the company has not shown would cause competitive harm if released. We therefore determine the remaining information in Exhibits A through C is not excepted from disclosure under section 552.110 and must be released.

Next, you contend that the information submitted as Exhibit D is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information protected by the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body.<sup>2</sup> TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.<sup>3</sup> TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the

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<sup>2</sup> The privilege does not apply when an attorney or representative is acting in a capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

<sup>3</sup> Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) of the Government Code generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You indicate that Exhibit D consists of confidential communications between the governor's staff and attorneys made for the purpose of providing legal services to the governor, and you indicate that the confidentiality of this information has been maintained. Based on your representations and our review, we determine that the information in Exhibit D may be withheld under section 552.107(1) of the Government Code.

Finally, you seek to withhold the information in Exhibit E pursuant to section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). Furthermore, the preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160 (Tex. App.--Austin 2001, no writ); Open Records Decision No. 615 at 4-5. You state that Exhibit E consists of draft versions of policymaking documents and internal communications reflecting the advice, opinions, and recommendations of the governor's staff concerning policy matters. Based on your representations and our review, we have marked information in Exhibit E that is excepted from disclosure under section 552.111 and may be withheld. The remainder of the information in Exhibit E, however, consists of purely factual information or information that does not document or reflect the governor's internal communications concerning policy matters. We therefore find the remainder of Exhibit E may not be withheld under section 552.111.

In summary, we have marked the portions of the information submitted as Exhibits A through C that the governor must withhold pursuant to section 552.110(b) of the Government

Code. Exhibit D may be withheld under section 552.107(1) of the Government Code as information protected by the attorney-client privilege. We have marked the information in Exhibit E that may be withheld pursuant to section 552.111 of the Government Code. The remainder of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 215317A

Enc: Submitted documents

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